No. 91-688

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC., and COMMODORE AVIATION, INC.,

Petitioners,

—v.—

MARIA BERNARDA ALVAREZ, as Personal Representative of the Estate of Amanda Maria Alvarez, Deceased, and on behalf of PEDRO P. ALVAREZ and MARIA BERNARDA ALVAREZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

George N. Tompkins, Jr.
Counsel of Record
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Attorneys for Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC. and COMMODORE AVIATION, INC.

QUESTION PRESENTED FOR REVIEW

Whether the decision of a District Court that the cause of action created by the Warsaw Convention is not exclusive, which decision is separate from and preceded consideration of a motion to remand the case to the state court from which removed, is insulated from federal appellate review by 28 U.S.C. § 1447(d)?

PARTIES TO THE PROCEEDING BELOW

The parties before the Court and to the proceedings below are:

1. Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA), AVIANCA, INC. and COMMODORE AVIATION, INC. (COMMODORE).

2. Respondents Maria Bernarda Alvarez, as personal representative of the Estate of Amanda Maria Alvarez (Deceased), and on behalf of Pedro P. Alvarez and Maria Bernarda Alvarez.

RULE 29.1 LIST

1. AVIANCA has the following non-wholly owned subsidiaries: Helicopteros Nacionales de Colombia, S.A. (Helicol), Aerocomercio Internal Ltda., Sociedad Productora y Comerc. de Alimentros Ltda. (Presto), Corporacion de Viajes Ltda. (Coviajes) and Sociedad Aeronautica de Medellin Consolidada, S.A. (SAM).

2. AVIANCA, INC. is a wholly owned subsidiary of AVIANCA.

3. COMMODORE is a subsidiary of Israel Aircraft Industries International, Inc.

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The Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA), AVIANCA, INC. and COMMODORE AVIATION, INC (COMMODORE) respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit, entered in the above-captioned proceeding on October 4, 1991, dismissing the appeal of the Petitioners.

OPINIONS BELOW

The unreported Order of the Court of Appeals for the Eleventh Circuit is reprinted in the Appendix hereto at 1a, *infra*.

The Memorandum Opinion and Order of Remand of the United States District Court for the Southern District of Florida (King, J.) is reported at 756 F. Supp. 550, and is reprinted in the Appendix hereto at 2a, *infra*.

JURISDICTION

The Order of the Court of Appeals for the Eleventh Circuit was entered on October 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 28 U.S.C. § 1447(d) which provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On January 25, 1990, an AVIANCA Boeing 707 aircraft operating as Flight 052 from Colombia to New York crashed in the vicinity of Cove Neck, New York. Of the 149 passengers on board, 65 were killed and 84 were injured. Numerous passenger wrongful death and personal injury actions were filed against Petitioners in various United States District Courts and in the state courts of Florida. The Judicial Panel on Multidistrict Litigation transferred all federal actions to the Eastern District of New York and Chief Judge Thomas C. Platt for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Air Disaster Near Cove Neck, New York, on January 25, 1990*, No. 843 (J.P.M.D.L. June 14, 1990).

The present case involves one of the wrongful death actions arising out of the crash. Respondents' decedent was travelling on AVIANCA Flight 052 pursuant to a ticket which provided for "international transportation" within the meaning of Article 1 of a treaty of the United States known as the Warsaw Convention.[1] It is undisputed that the Warsaw Convention is applicable to this and the other pending actions arising out of the crash of Avianca Flight 052.[2]

The action originally was commenced in the Circuit Court for Dade County, Florida and sought relief solely pursuant to the Florida Wrongful Death Statute. The Complaint as filed did not make reference to the Warsaw Convention or assert any rights thereunder, although the Complaint did allege that Respondents' decedent was killed in the accident involving AVIANCA Flight 052 on January 25, 1990. The Complaint also alleged that Respondents' decedent was travelling pursuant to a ticket for AVIANCA Flight 052 which originated in Colombia and was destined for New York.

The District Court Proceedings: Petitioners timely removed the action to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. §§ 1331 and 1441 on the ground that Respondents' claims arise under and are governed by the Warsaw Convention and federal question jurisdiction therefore exists.[3]

After removal, Respondents moved to remand the action on the ground that the Complaint did not invoke or raise any

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. App. § 1502.

2 The Warsaw Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, Article 1, 49 Stat. 3014. It also is undisputed that Article 17 of the Convention creates a cause of action for wrongful death. *See Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

3 It is conceded that removal was available only on federal question grounds.

federal law, treaty or statute and was founded solely on the Florida Wrongful Death Statute. In support of the motion, Respondents argued that the Warsaw Convention does not provide the exclusive cause of action but provides only an exclusive *remedy* that preempts inconsistent state law remedies. Therefore, Respondents' argument continued, there was no federal question involved so as to confer jurisdiction by removal on the District Court pursuant to 28 U.S.C. §§ 1331 and 1441.

In opposing the remand motion, Petitioners argued that regardless of the allegations in the Complaint and the reliance by Respondents on local state law for the alleged cause of action for wrongful death, the Warsaw Convention applied by operation of law to provide Respondents with the exclusive cause of action and therefore removal on federal question jurisdiction grounds was proper.

Prior to addressing or deciding the remand motion, the District Court reached a decision that the Warsaw Convention cause of action is not exclusive even where it unquestionably applies to the transportation. Appendix at 5a-10a, *infra*, 756 F. Supp. at 553-55. In reaching this decision, the District Court, relying on its own 1986 decision in *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986) (King, J.), reasoned as follows:

> At the outset of this discussion, it is important to recognize that the availability of a federal cause of action founded upon the Warsaw Convention has been squarely resolved in the circuit. . . . If there were no federal cause of action, this court would need to go no further before reaching a decision to remand this case to state court. Because a federal cause of action exists under the Warsaw Convention, however, the court needs to determine whether it is exclusive.
>
> * * *
>
> Although the Warsaw Convention sets forth certain uniform procedural rules with respect to the filing of

> claims, it is clear that the Convention does not presuppose to make such rules completely uniform. . . . The fact that a federal cause of action has been recognized under the Warsaw Convention does not change the fact that the Convention leaves matters to local law.
>
> * * *
>
> [V]arious courts, including the *Velasquez* court, have taken the contrary position that a cause of action arising under the Warsaw Convention is the exclusive federal cause of action available to plaintiffs.
>
> * * *
>
> Many of the other courts which state that the Warsaw Convention's cause of action is exclusive have done so without much, if any, discussion; others have simply addressed the issue in dicta. Moreover, these cases also generally fail to analyze the "however founded" language of Article 24(1) and the distinction between remedies and causes of action under the Convention.
>
> * * *
>
> For the reasons set forth above, this court holds that the Warsaw Convention does not create the exclusive cause of action in those cases to which it is applicable.

Appendix at 5a-10a, *infra*, 756 F. Supp. at 553-55.

Following this decision, the District Court then addressed and proceeded to decide the remand motion, holding:

> Having determined that the Warsaw Convention does not create an exclusive cause of action, this court next addresses whether the defendants can properly remove this case.
>
> * * *
>
> Because the plaintiff has set forth a cause of action under state law without bringing in any federal theory and because the Warsaw Convention's cause of action is

> not exclusive, the plaintiff's complaint does not arise under federal law so as to confer removal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441.

Appendix at 10a-12a, *infra*, 756 F. Supp. at 555-56.

The District Court granted the motion and remanded the action to the Circuit Court for Dade County, Florida. Appendix at 12a, *infra*, 756 F. Supp. at 556.

The Court of Appeals Proceedings: Petitioners filed a Petition for Writ of Mandamus, pursuant to 28 U.S.C. § 1651, requesting the Eleventh Circuit to direct the District Court to vacate the remand order and reinstate the action. The Petition for a Writ of Mandamus was denied on March 8, 1991. Before the Petition was denied, Petitioners also filed a Notice of Appeal from the decision of the District Court that the Warsaw Convention did not provide the exclusive cause of action. Pursuant to a Memorandum of the Court of Appeals dated March 22, 1991, the jurisdictional issue was carried with the case and was fully addressed in the briefs along with the substantive issue of whether the Warsaw Convention provides Respondents' exclusive cause of action.

After Petitioners filed their brief on the merits, Respondents filed a motion to dismiss the appeal on the authority of *Calderon v. Aerovias Nacionales de Colombia, S.A.*, 929 F.2d 599 (11th Cir. 1991), in which an appeal similar to this case was dismissed for lack of appellate jurisdiction. A petition for a writ of certiorari in *Calderon* was filed on September 13, 1991 and currently is pending before the Court. *Aerovias Nacionales de Colombia, S.A. v. Calderon*, No. 91-418 (U.S. cert. filed Sept. 13, 1991). The Court of Appeals, in an Order dated October 4, 1991, granted Respondents' motion and dismissed the appeal in this case simply stating:

> The district court's conclusion regarding the exclusivity of the remedy provided by the Warsaw Convention is inextricably interwoven with its decision to remand the action to state court. Accordingly, its order is not

appealable. *See Calderon v. Aerovias Nacionales de Colombia*, 929 F.2d 599 (11th Cir. 1991).

Appendix at 1a, *infra*.

REASONS FOR GRANTING THE WRIT

The issue presented in this case is the same issue presented in the petition for a writ of certiorari in *Aerovias Nacionales de Colombia, S.A. v. Calderon*, No. 91-418 (U.S. cert. filed Sept. 13, 1991), currently pending before the Court—the extent to which 28 U.S.C. § 1447(d) shields from review a district court's decision regarding the scope and effect of the Warsaw Convention cause of action. As the Convention is a treaty of the United States, this issue has far reaching ramifications, not only on the substantive rights of Petitioners in this case, but on all pending and future actions to which the Convention applies. The court below has expanded the non-reviewability rule of 28 U.S.C. § 1447(d) to encompass, not simply remand orders, but decisions of a substantive non-jurisdictional nature if the decision has a subsequent effect on the separate decision to remand.

The Court of Appeals for the Eleventh Circuit, on the authority of its prior *Calderon* decision, incorrectly held that 28 U.S.C. § 1447(d) precluded it from reviewing the substantive decision of the District Court that the Warsaw Convention did not provide Respondents with the exclusive cause of action and thus dismissed the appeal. In following the *Calderon* decision and holding that it had no jurisdiction to review this substantive decision of the District Court, the Eleventh Circuit has again decided a federal question in a way that conflicts in principle with the applicable decisions of the Court and numerous other Circuit Courts. The Eleventh Circuit thereby has sanctioned such a departure by the District Court from the accepted and usual principles of treaty interpretation as to require the Court to exercise its power of supervision.

The Eleventh Circuit also has incorrectly decided a recurring important question of federal appellate jurisdiction, *viz*, the intended scope of § 1447(d), which should be reviewed and settled by the Court in order to insure uniformity in the application of § 1447(d).

I

THE ELEVENTH CIRCUIT'S FAILURE TO REVIEW THE DISTRICT COURT'S DECISION AS TO THE EXCLUSIVITY OF THE WARSAW CONVENTION CAUSE OF ACTION CONFLICTS IN PRINCIPLE WITH THE COURT'S DECISION IN *WACO V. UNITED STATES FIDELITY & GUARANTY CO.* AND THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

As in the *Calderon* case, this case does not involve an appeal from a remand order. This case involves an appeal from a district court's substantive legal decision regarding the scope and effect of a treaty of the United States, which *preceded* consideration of a remand motion and ultimate entry of a remand order.

Prior to remanding this action, the District Court decided that the Warsaw Convention does not provide Respondents with the exclusive cause of action. The Eleventh Circuit, in dismissing the appeal, held that 28 U.S.C. § 1447(d) bars review of this decision because the court viewed the District Court's exclusivity decision as "inextricably interwoven with its decision to remand the action to state court." Appendix at 1a, *infra*. This holding of the Court of Appeals is erroneous and conflicts in principle with the Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) and numerous decisions of other Circuit Courts of Appeal.

In *Waco*, 293 U.S. 140 (1934), a case involving a district court's order of dismissal of a party's cross-action (third-party action) which resulted in the remand of the case to

state court, the Fifth Circuit Court of Appeals had dismissed the appeal on the grounds that no appeal lies from an order of remand. In reversing the Fifth Circuit and holding the dismissal order reviewable, the Court stated:

> If the District Court's order stands the cross-action will be no part of the case which is remanded to the state court. Indeed, if the District Court was right, the cause could not have been remanded except for the exclusion of the [third-party defendant] as a party. True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

Waco, 293 U.S. at 143.

The limitations on the scope of the nonreviewability rule as to remand orders, as enunciated by *Waco*, have been recognized by numerous Circuit Courts of Appeal in interpreting and applying 28 U.S.C. § 1447(d). *See Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir. 1991); *Mitchell v. Carlson*, 896 F.2d 128, 132 (5th Cir. 1990); *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990); *Karl Koch Erecting Co. v. N.Y. Convention Center Dev. Corp.*, 838 F.2d 656, 658 (2d Cir. 1988); *Allen v. Ferguson*, 791 F.2d 611, 613-15 (7th Cir. 1986); *Clorox Co. v. U.S. Dist. Court for the Northern Dist. of California*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984); *Kozera v. Spirito*, 723 F.2d 1003, 1005 n.1 (1st Cir. 1983); *Katsaris v. United States*, 684 F.2d 758, 761 (11th Cir. 1982); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385, 1387 (11th Cir. 1982); *Southeast Mortg. Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975).

For example, in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the Court of Appeals for the Ninth Circuit held that appellate jurisdiction

exists to review a substantive legal decision which precedes a remand order. The court held:

> [T]he district court ordered the case remanded to state court after it found the parties' agreement to litigate in state court enforceable. Not only did the court's determination that the forum selection clause was valid and enforceable precede the remand order, it formed the basis of that order. Like the dismissal in *Waco*, the court's decision that the contract clause is enforceable, if not reversed or set aside, is conclusive upon [defendant], and, therefore, must be reviewed. To hold otherwise would deprive [defendant] of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions from review.

Pelleport, 741 F.2d at 277.

The general principles and rationale enunciated by the Supreme Court in *Waco* and its progeny are that the statutory nonreviewability rule has its limits and does not extend to insulate from review substantive decisions rendered prior to remand which affect the substantive rights of a party. The extension of 28 U.S.C. § 1447(d) to insulate such decisions from appellate review would deprive a litigant of its right to appeal a substantive legal determination as to the scope and effect of a treaty binding upon that party in subsequent proceedings. *Cf. In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 845-47 (3d Cir. 1991).

As in *Waco*, Petitioners here sought review of a substantive legal decision (*i.e.* the exclusivity of the Warsaw Convention cause of action) that preceded the remand order. In summarily holding that this aspect of the District Court's decision was not reviewable, the Eleventh Circuit sidestepped the essential distinction drawn by the Court in *Waco* between an appeal from a remand order and an appeal from a decision which precedes a remand order, by characterizing the District Court's exclusivity decision as "inextricably interwoven" with the decision to remand. Appendix at 1a, *infra*. It

is this aspect of the Eleventh Circuit's decision which conflicts in principle with *Waco*.[4]

In order to arrive at its result, the court below, as did the court in *Calderon*, ignored that the District Court first and separately rendered a substantive decision that the Warsaw Convention cause of action was not exclusive and that Respondents, at their option, could bring a wrongful death action under local state law, even where the Convention unquestionably applies. Only after this decision had been rendered did the District Court then proceed to address and then decide the remand motion. The District Court specifically segregated the exclusivity issue from the jurisdictional issue and first addressed, at some length and in a separately labelled section, the exclusivity issue. The District Court itself recognized that it was making a substantive legal decision apart from the jurisdictional issue when it stated:

> If there were no federal cause of action, this court would need to go no further before reaching a decision to remand this case to state court. Because a federal cause of action exists under the Warsaw Convention, however, the court needs to determine whether it is exclusive.

Appendix at 6a, *infra*, 756 F. Supp. at 553.

Only after the District Court had decided that the federal Warsaw Convention cause of action is not exclusive did the District Court separately address the remand issue:

> Having determined that the Warsaw Convention does not create an exclusive cause of action, this court next

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4 The District Court's decision prior to remand, that the Warsaw Convention does not provide Respondents' exclusive cause of action, is a binding legal decision which affects the substantive rights of Petitioners and is appealable as a final collateral order pursuant to 28 U.S.C. § 1291. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Foster*, 933 F.2d at 1211; *Pelleport*, 741 F.2d at 278. The decision in effect ends the litigation in the federal forum, amounting to a dismissal since its effect is to surrender jurisdiction to the state court and, if not appealable now, the order will be unreviewable. *Id.*

> addresses whether the defendants can properly remove this case.

Appendix at 10a, *infra*, 756 F. Supp. at 555.

It is clear that the decision to remand was not based on the allegations of the Complaint but necessarily was preceded by the substantive legal decision of the District Court that the Warsaw Convention cause of action is not exclusive. The District Court's erroneous decision on this issue should not be insulated from review because it preceded a remand order nor because of the Eleventh Circuit's self-serving but faulty view of the decision as "inextricably interwoven" with the remand order.

The court below also ignored the numerous substantive effects that the District Court's decision has on the rights of the parties after remand, apart from the jurisdictional effects. For example, the District Court's decision will affect Petitioners' substantive rights as to the applicable substantive law, choice of law rule and measure of damages. *See In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3293 (Oct. 15, 1991). The court below, in summarily dismissing the appeal, failed to address these issues.

As with the district court's decision in *Calderon*, the District Court's exclusivity decision in this case can be applied to any Warsaw Convention case and in a non-jurisdictional context. The Court of Appeals in this case simply ignored the wide-ranging nonjurisdictional effects of the District Court's decision, as did the Eleventh Circuit in *Calderon*, and relying on *Calderon*, dismissed the appeal. In this, the court below erred.

The *Calderon* court was confused as to the scope and effect of § 1447(d) and *Waco* in an action governed by the Warsaw Convention. This confusion is evidenced by the preemption cases it relied upon in dismissing the *Calderon* appeal. *See, e.g., Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989); *Glasser v. Amalgamated Workers*

Union Local 88, 806 F.2d 1539 (11th Cir. 1986). The courts in those cases would have reviewed the district court decisions preceding the remand orders but for the fact that the federal law which the defendants there attempted to invoke to support removal did not definitely apply to the factual allegations in the complaints. Thus, the decisions affected only the forum and not the substantive rights of the parties. Unlike *Glasser* and *Hansen*, the applicability of the federal law in this case, the Warsaw Convention, is unquestionable. Moreover, the issue of the exclusivity of the Convention cause of action affects not only the forum in which the case is to be heard but has conclusive binding effects on the substantive rights of the Petitioners in state court subsequent to remand. Even *Glasser* noted that where the district court reaches "the merits of the preemption argument", the decision is reviewable. 806 F.2d at 1540.

The rationale and principle of *Waco* cannot be circumvented to deprive Petitioners of their right to appeal a decision of substantive law simply by labeling that decision as "inextricably interwoven" with the jurisdictional issue or simply because the "exclusivity" issue also affects jurisdiction.

II

THE ELEVENTH CIRCUIT'S DECISION SANCTIONS A DECISION BY THE DISTRICT COURT WHICH SO FAR EXCEEDS THE PERMISSIBLE LIMITS OF TREATY INTERPRETATION AS TO REQUIRE THE EXERCISE BY THE COURT OF ITS SUPERVISORY POWERS

The decision of the Eleventh Circuit in turn effectively has sanctioned the District Court's erroneous decision that the Warsaw Convention does not provide the exclusive cause of action, a decision which has wide-ranging implications beyond the facts of this case.

Although the District Court recognized that the Warsaw Convention creates a federal cause of action for wrongful

death and that numerous decisions have held that this cause of action is the exclusive cause of action for claims arising out of "international transportation," the District Court nevertheless held that the Convention cause of action is not exclusive but only creates the exclusive "remedy." Appendix at 10a, *infra*, 756 F. Supp. at 555. In reaching this decision, the District Court failed to properly review the language, goals and drafting history of the Convention, contrary to well established rules of treaty interpretation. *See Eastern Airlines, Inc. v. Floyd*, 113 L. Ed. 2d 569 (1991); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

The language, goals and drafting history of the Warsaw Convention establish that the Convention was intended to create *the* uniform cause of action for damages arising out of international transportation by air. As a treaty which was created for the purpose of establishing uniform rules with respect to the liability of air carriers, the Convention exclusively governs the rights and responsibilities of passengers and carriers wherever it applies. *See Lockerbie*, 928 F.2d 1267; *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670 (S.D. Fla. 1990); *Eggink v. Trans World Airlines, Inc.*, 22 Av. Cas. (CCH) 17,731 (S.D.N.Y. 1990). As the court stated in *Lockerbie*:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state

> law causes of action could fail to frustrate these purposes.

Lockerbie, 928 F.2d at 1275 (citations omitted).

The District Court's non-exclusivity decision is not an isolated incident. The practice prevails in the Southern District of Florida of permitting plaintiffs to avoid the full application of the Warsaw Convention to wrongful death and personal injury actions simply by not mentioning the Convention in the complaint. The *Rhymes* and *Calderon* cases are clear examples. In failing to review the District Court's decision regarding the exclusivity of the Warsaw Convention cause of action, the Eleventh Circuit sanctions this practice. Of even greater import, the court below has tacitly decided that the application of the uniform liability rules of the Convention is at the option of the plaintiff. The Court should exercise its supervisory powers in order to ensure the consistent and uniform application of the Warsaw Convention and its goals.

III

THE DECISION BELOW RAISES RECURRING IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL APPELLATE JURISDICTION

The scope of § 1447(d) in relation to the wholesale remand of Warsaw Convention cases in the Southern District of Florida, and eventually throughout the Eleventh Circuit, raises a recurring important question of federal appellate jurisdiction which should be clarified and resolved by the Court.

A. Review is Necessary to End Confusion Among Lower Courts and Litigants Interpreting 28 U.S.C § 1447(d)

The courts have given § 1447(d) and *Waco* inconsistent interpretations which has led to confusion and irreconcilable conflicts among the lower courts as to the application of § 1447(d) and its effect on the litigants.

Confusion exists as to whether a substantive decision preceding a remand order merely is "interwoven with" or "intrinsic to" the remand, or whether such a decision is separate and apart from the remand order and, thus, reviewable. *See, e.g., Calderon*, 929 F.2d 599; *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991); *Hansen*, 891 F.2d 1384; *Whitman v. Raley's, Inc.*, 886 F.2d 1177 (9th Cir. 1989); *Glasser*, 806 F.2d 1539; *Allen*, 791 F.2d 611; *Clorox*, 779 F.2d 517; *Pelleport*, 741 F.2d 273. The lack of any definitive guidance or standard has resulted in the development of questionable rationale and doctrines which often ignore the substantive effects of such decisions on the parties after remand. *See, e.g., Soley*, 923 F.2d 406; *Whitman*, 886 F.2d 1177. Indeed, the doctrine adopted in *Whitman* and *Soley*, as to whether a pre-remand decision is reviewable, is unworkable and irrelevant in a Warsaw Convention case such as here, because only the effect of the Convention, and not its applicability, is disputed.

Similarly, some courts have held that while a substantive decision preceding a remand order is reviewable, the court is powerless to reinstate the action in federal court even if the substantive decision preceding remand was erroneous. *See, e.g., Tillman v. CSX Transportation, Inc.*, 929 F.2d 1023 (5th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3262 (Oct. 7, 1991); *Soley*, 923 F.2d 406; *Allen*, 791 F.2d 611. Yet other courts not only have reviewed the substantive decision preceding a remand order but have reinstated the action in federal court. *See, e.g., Foster*, 933 F.2d 1207; *Mitchell*, 896 F.2d 128; *Regis*, 894 F.2d 193; *Clorox*, 779 F.2d 517; *Katsaris*, 684 F.2d 758.

Courts also have held that it is within the state court's discretion, after remand, to determine the preclusive effects of a district court's pre-remand substantive decision in the state court proceedings. *Hansen*, 891 F.2d 1384; *In re Life Ins. Co. of N. America*, 857 F.2d 1190 (8th Cir. 1988); *Pelleport*, 741 F.2d 273. Other courts have simply defined this troubling issue away, concluding that the district court's pre-remand decision would have no preclusive effect on the state court's

consideration of the same issue. *Soley*, 923 F.2d 406; *Whitman*, 886 F.2d 1177; *Survival Systems Division of the Whittaker Corp. v. U.S. Dist. Court for the Southern Dist. of California*, 825 F.2d 1416 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); *Glasser*, 806 F.2d 1541. In summarily dismissing the appeal, the court below did not consider the preclusive effect that the District Court's non-exclusivity decision would have on the rights of Petitioners in the subsequent state court proceedings.

Review by the Court is necessary to provide definitive guidance to end the recurring confusion and conflict among the lower courts in the application and interpretation of *Waco* and § 1447(d), particularly in relation to the intended scope of the Warsaw Convention cause of action.

B. The Eleventh Circuit Decision Extends the Nonreviewability Rule Beyond the Limits of 28 U.S.C. § 1447(d)

The Eleventh Circuit's extension of the nonreviewability rule to an exclusivity decision preceding a remand order, in actions governed by the Warsaw Convention, is improper and is contrary to the purpose, intent and scope of both § 1447(d) and the Warsaw Convention. The policy underlying the nonreviewability of remand orders is conspicuously absent in cases such as this. The rationale for the rule is to prevent delay by protracted litigation over simple jurisdictional issues and is justified where the decision affects only the forum. This rationale is not applicable when a decision which precedes and then results in the remand order affects the substantive rights of a party after remand. In *Waco*, the Court recognized the right of a litigant, such as Petitioners, to appeal a conclusive substantive legal decision which preceded a remand order. The Court declined to extend the nonreviewability rule to such decisions because to do so would extend the rule beyond its intended scope and purpose. Therefore, "where a district court bypasses the jurisdictional arguments and reaches the merits of a . . . dispute, the policy [of § 1447(d)] is inapplicable. Any delay caused by [the]

appeal . . . is a delay that must be countenanced." *Pelleport*, 741 F.2d at 277.

Federal question removal jurisdiction was intended to provide a federal forum for the protection of federal rights and to encourage the development of expertise by federal courts in the interpretation and application of federal law. *Boys Mkts., Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235, 246 n.13 (1970).[5] The Court has granted certiorari to ensure the uniform interpretation of treaties and has granted certiorari to ensure the uniform and consistent interpretation of the Warsaw Convention in accordance with the express goals of the drafters of the treaty. *See Floyd*, 113 L. Ed. 2d at 584-88; *Chan*, 490 U.S. at 134 n.5; *Saks*, 470 U.S. at 399; *Franklin Mint Corp.*, 466 U.S. at 247, 255-56. The extension of § 1447(d) to encompass the District Court's determination that the Warsaw Convention cause of action is not exclusive runs directly counter to the goal of uniformity sought to be achieved by the treaty. The effect of the Eleventh Circuit decision in this case is to allow each district court to reach its own conclusion as to the scope and effect of the Convention. This has resulted in inconsistent decisions which as of now are held in the Eleventh Circuit to be completely insulated from review.[6] Congress certainly did not intend to immunize from federal appellate review a matter of treaty interpretation by the nonreviewability rule.

The District Court effectively has subordinated a treaty of the United States, created for the express purpose of creating

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5 The extension of the nonreviewability rule to the decision in this action not only binds Petitioners to an erroneous and adverse decision as to the Warsaw Convention by the District Court, but frustrates, rather than facilitates, the formation of a uniform, interpretive body of federal law.

6 There are even conflicting decisions in the Southern District of Florida on this exclusivity issue. *Compare Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670 (S.D. Fla. 1990) (Convention cause of action is exclusive and removal proper) with *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986) (Convention cause of action is not exclusive and removal improper).

a uniform system of liability, to a state wrongful death statute. Given the increasing frequency with which plaintiffs are adopting this ploy to avoid the full effect of the Convention, the issue of the reviewability of such pre-remand decisions will recur and continue to escalate until the Court resolves this important issue.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

George N. Tompkins, Jr.
Counsel of Record
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Attorneys for Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC. and COMMODORE AVIATION, INC.

Of Counsel:

Michael J. Holland
Andrew J. Harakas
Deborah A. Elsasser

Dated: October 24, 1991

APPENDIX

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5197

Filed October 4, 1991

MARIA BERNARDA ALVAREZ, as personal representative of the Estate of Amanda Alvarez, Deceased and on behalf of Pedro Alvarez and Maria Bernarda Alvarez,

Plaintiff-Appellee,

—versus—

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA INC., AND COMMODORE AVIATION, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

Before:

FAY, HATCHETT and DUBINA,

Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss the appeal is GRANTED. The district court's conclusion regarding the exclusivity of the remedy provided by the Warsaw Convention is inextricably interwoven with its decision to remand the action to state court. Accordingly, its order is not appealable. *See Calderon v. Aerovias Nacionales de Colombia*, 929 F.2d 599 (11th Cir. 1991).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 90-2494-CIV.

Jan. 25, 1991

Maria Bernarda ALVAREZ, as Personal Representative of the Estate of Amanda Maria Alvarez, Deceased, and on behalf of Pedro P. Alvarez and Maria Bernarda Alvarez,

Plaintiff,

—v.—

AEROVIAS NACIONALES de COLOMBIA, S.A., Avianca, Inc., and Commodore Aviation, Inc.,

Defendants.

MEMORANDUM OPINION AND ORDER OF REMAND

JAMES LAWRENCE KING, *Chief Judge*.

This case arises out of the tragic airplane crash of Avianca Flight 52 in Cove Neck, New York, on January 25, 1990. The case was originally filed as a wrongful death action in the Circuit Court in and for Dade County, Florida. The defendants removed the action to this court, claiming that removal was proper because the Warsaw Convention[1] provided the plaintiff's exclusive cause of action. This case is now before the court on the plaintiff's motion to remand the case to state court.

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C.App. § 1502 note (1988) (hereinafter "Warsaw Convention").

The basis for the defendants' removal of this action to this court stems from the fact that the accident was one of "international transportation." Article 1(1) of the Warsaw Convention states: "This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire." At the time of the crash, Flight 52 was en route from Medellin, Colombia, to John F. Kennedy Airport in New York. Defendants assert that, inasmuch as plaintiff's decedent was travelling pursuant to a ticket which provided for "international transportation" within the meaning of the Warsaw Convention, the provisions of the Warsaw Convention apply to this action and exclusively govern it.

Before delving into the issues which comprise the parties' arguments for removal and remand of this case, the court must first address another matter. In another case arising out of the crash of Avianca Flight 52, the defendants removed the action to the Southern District of Florida. *Calderon v. Aerovias Nacionales de Colombia*, 738 F. Supp. 485 (S.D.Fla.1990) (Aronovitz, J.), *appeal filed*, No. 90-5560 (11th Cir.1990). In *Calderon*, Judge Aronovitz entered an order remanding the case to state court. The defendants appealed the decision, and oral argument before the Eleventh Circuit Court of Appeals was heard on December 20, 1990. Defendants have asked this court to delay ruling on the motion to remand pending the result of the *Calderon* appeal, but this court must reject that request for several reasons.

First, although it is possible that the appellate decision could affect the outcome in this case, the oral argument in the appellate court and the applicable precedent in the area of remand reveal that the Eleventh Circuit is probably more concerned with the issues of appellate jurisdiction and reviewability than with the issues which this court faces. The Eleventh Circuit has also already denied a petition for mandamus in *Calderon*.

Furthermore, a deferred ruling could result in a mooting of the issue raised by the parties, due to the probability of a transfer of this case from this jurisdiction by the Judicial Panel on Multidistrict Litigation. Although the defendants have asserted that no hearing on transfer has been scheduled

within the near future, the Judicial Panel on Multidistrict Litigation has already transferred several cases arising from this same air disaster to the United States District Court for the Eastern District of New York.

Finally, it is the duty and responsibility of this court to proceed deliberately toward a decision in this case. Should the Eleventh Circuit reach and decide the issues now before this court in a different manner, the parties in this case can then seek appropriate relief.

State Law Causes of Action and the Warsaw Convention

Plaintiff filed her complaint in state court, grounding the action in state wrongful death law and nowhere invoking any federal law or statute as a basis for her claim. In the notice of removal, the defendants have asserted the right to remove this case to federal court pursuant to 28 U.S.C. §§ 1441 and 1331, claiming that the Warsaw Convention provides the exclusive federal cause of action under the facts alleged in the complaint. The defendants argue that their notice of removal properly vested this court with removal jurisdiction, because plaintiff's attempt to plead this case under the Florida Wrongful Death Act, without reference to federal law and the Warsaw Convention, is simply an attempt to circumvent an exclusively federal cause of action founded upon the Convention. They argue that, in the context of a case in which the Warsaw Convention applies, no state cause of action is available as a theory of liability.

In support of the motion to remand to the Florida court, however, the plaintiff argues that the Warsaw Convention does not provide the exclusive cause of action. Rather, the plaintiff argues that her action can proceed as a state law cause of action that is bounded by the exclusive *remedy* provided for in the Warsaw Convention. Thus, the plaintiff argues, the Warsaw Convention provides an exclusive remedy that may preempt inconsistent remedies otherwise available under state law, but state law theories may still provide the cause of action. Removal would therefore be inappropriate because the exclusive remedy limitations of the Warsaw Con-

vention would be no more than a defense to a valid state law cause of action.

In addressing the arguments set forth by the parties in their briefs and at oral argument, including the argument of the *amicus curiae*,[2] the court must address two inconsistent decisions that were rendered in this district. The first decision was reached by this court in 1986 in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D.Fla.1986) (King, C.J.). The second decision was reached several months ago in *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F.Supp. 670 (S.D.Fla.1990) (Scott, J.). These two memorandum opinions each address the issues presented in the motion to remand *sub judice*, but each comes to a different conclusion as to the exclusivity of the federal cause of action available under the Warsaw Convention. Neither the United States Supreme Court nor the United States Court of Appeals for the Eleventh Circuit has yet provided a definitive answer to this question of exclusivity, *see Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1482 & n. 33 (11th Cir.1989), *cert. granted*, ____ U.S. ____, 110 S.Ct. 2585, 110 L.Ed.2d 266 (1990), but the language and history of the Warsaw Convention, as they have been interpreted by the courts, provide the necessary guidance to resolve this issue.

The Cause of Action Under the Warsaw Convention

At the outset of this discussion, it is important to recognize that the availability of a federal cause of action founded upon the Warsaw Convention has been squarely resolved in this circuit. *See Floyd*, 872 F.2d at 1469-70; *see also Velasquez*, 747 F.Supp. at 675; *Rhymes*, 636 F.Supp. at 739-40. Although many initially assumed that the Warsaw Convention created a cause of action, for decades following the United States' adherence to the Convention, the courts of the United States did not even interpret the Convention as creat-

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2 Representing the *amicus curiae*, Guillermo Camargo, the law firm of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin filed a memorandum and appeared at the hearing before this court in support of the plaintiff's motion to remand.

ing an independent cause of action. Beginning in the late 1970's, however, courts reexamining this issue have generally changed course and recognized the existence of an independent cause of action founded upon the Warsaw Convention.[3] If there were no federal cause of action, this court would need to go no further before reaching a decision to remand this case to state court. Because a federal cause of action exists under the Warsaw Convention, however, the court needs to determine whether it is exclusive.

Exclusivity of Warsaw Cause of Action

In determining whether the Warsaw Convention creates the exclusive cause of action in cases such as the instant case, it is important to look at the history and language of the Convention. The history behind the Warsaw Convention reveals that there were two basic goals underlying the drafting of the Convention. As the Eleventh Circuit has stated, those goals were: (1) "to establish uniformity as to documentation such as tickets and waybills, and procedures for dealing with claims arising out of international transportation"; and (2), the more important goal at that time, "to limit the potential liability of air carriers in the event of accidents and lost or damaged cargo." *Floyd*, 872 F.2d at 1467. In attempting to implement these goals, the Convention did in fact establish requirements for air waybills and tickets, and a limitation was indeed placed on the liability of carriers, although this limitation has since been modified.[4] The Convention also made uniform various procedural rules for claims arising from losses that occur in international transportation.

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3 *See, e.g.*, *Floyd*, 872 F.2d at 1469-70; *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979); *Rhymes v. Arrow Air*, 636 F.Supp. at 740.

4 Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. E-28680, May 13, 1966, 31 Fed.Reg. 7302 (1966) ("Montreal Agreement").

Although the Warsaw Convention sets forth certain uniform procedural rules with respect to the filing of claims, it is clear that the Convention does not presuppose to make such rules completely uniform. While the Convention sets forth rules on such matters as presumptions of liability, liability limitations, and statutes of limitations, it also leaves many matters to the laws of the sovereign nations that have signed the Convention or adhered to it. In several instances, it even expressly commands the application of the local law of the forum. *See*, *e.g.*, Warsaw Convention Arts. 28(2),[5] 29(2)[6]. The fact that a federal cause of action has been recognized under the Warsaw Convention does not change the fact that the Convention leaves matters to local law. In dealing with problems arising among sovereign nations, the Convention appears to have been unconcerned with the manner in which a forum determined the substance of its local law. The court has found no evidence which would indicate that the Convention was concerned with whether the applicable local substantive law was the result of state law within a federal system of government or national law.

A few courts, including Judge Scott in *Velasquez*, have held that the Warsaw Convention creates the exclusive federal cause of action under which a plaintiff may bring action. Many other courts,[7] including this court in *Rhymes*, have held that the Convention allows causes of action arising under both state law and federal law (the Warsaw Convention), but the Convention provides the exclusive remedy that preempts inconsistent remedies otherwise provided for under

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5 "Questions of procedure shall be governed by the law of the court to which the case is submitted." Warsaw Convention Art. 28(2).

6 "The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted." Warsaw Convention Art. 29(2).

7 In this district alone, in cases arising out of an aircrash of a Pan American flight in 1982, eight judges remanded cases to state court. These judges included Judge Aronovitz, Judge Atkins, Judge Davis, Judge Hastings, Judge Hoeveler, Judge Kehoe, Judge Spellman, and the undersigned. *See* memorandum of Amicus Curiae in Support of Plaintiff's Motion to Remand at 2 n. 2.

state law causes of action. *See Floyd*, 872 F.2d at 1482 n. 33 (collecting cases following these two contrary approaches). The Eleventh Circuit has expressly declined to decide whether the Warsaw Convention preempts state law causes of action, but the Eleventh Circuit's opinions reflect the distinction between the availability of a cause of action under the Convention and the exclusivity of the remedy. *See Floyd*, 872 F.2d at 1469-70, 1482 & n. 33[8]; *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir.1987) ("The Warsaw Convention creates the cause of action upon which [the plaintiff] relies and is the exclusive remedy against international air carriers for lost or destroyed cargo.").

Rhymes v. Arrow Air, *supra*, involved a case of wrongful death, stemming from an international air disaster, in state court based on state law. The defendants in *Rhymes*, as the defendants here, removed the case based on the grounds that the wrongful death claims necessarily presented a federal cause of action under the Warsaw Convention. In concluding that removal was improper, this court held that the Warsaw Convention created the exclusive remedy, not the exclusive cause of action, in cases to which the Convention applied.

In the analysis in *Rhymes*, the court focused on the history of the Convention and, more particularly, on the language of Article 24(1). Article 24(1) of the Warsaw Convention states that "any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention." Warsaw Convention Art. 24(1) (emphasis added).[9] "The best explanation for the wording of Article

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8 Although the court in *Floyd* declined to decide the exclusive nature of a cause of action founded under the Warsaw Convention, the court nonetheless remanded both the federal cause of action and the parallel state law cause of action to the district court. 872 F.2d at 1467, 1490.

9 Although Subsection 1 of Article 24 applies to claims for damaged baggage or goods, Subsection 2 makes claims for personal injury subject to Subsection 1. Warsaw Convention Art. 24(2). Subsection 2 then goes on to add that Subsection 1 applies "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." *Id.*

24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive. For example, in the United States, state law causes of action may be invoked by plaintiffs injured during international air transportation." *In re Mexico City Aircrash*, 708 F.2d at 414 n. 25; *see also Johnson v. American Airlines, Inc.*, 834 F.2d 721, 722 (9th Cir.1987) ("State-law claims . . . can only be maintained subject to the conditions and limits outlined in the Warsaw Convention."); *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir.1980).

As was already noted, various courts, including the *Velasquez* court, have taken the contrary position that a cause of action arising under the Warsaw Convention is the exclusive federal cause of action available to plaintiffs. Instead of analyzing and distinguishing the *Rhymes* opinion, the only place the *Velasquez* opinion even confronts *Rhymes* is in a brief footnote.[10] Moreover, *Velasquez* does not discuss the "however founded" language from Article 24(1), except in a footnote in the order on rehearing. *See Velasquez*, 747 F.Supp. at 678 n. 4.

Velasquez focused on the Convention's concern for uniformity. Judge Scott stated that if separate state law causes of action were allowed to supersede the Convention's exclusivity, air carriers in this country alone would be exposed to 50 separate and distinct causes of action. *Id.* at 676. However, as was discussed previously, the uniformity desired by the drafters of the Convention was not complete and utter uniformity. The Convention itself makes provisions for the application of local law. *See supra* notes 5-6 and accompanying text.

Many of the other courts which state that the Warsaw Convention's cause of action is exclusive have done so without much, if any, discussion; others have simply addressed

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10 "The Court recognizes that its opinion today is contrary to the holding reached by Chief Judge King in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D.Fla. 1986). However, having thoroughly considered the reasoning employed in *Rhymes* the Court must respectfully disagree and reach a contrary conclusion." *Velasquez*, 747 F.Supp. at 675 n. 15.

the issue in dicta. Moreover, these cases also generally fail to analyze the 'however founded" language of Article 24(1) and the distinction between remedies and causes of action under the Convention.

By creating an exclusive remedy, the Convention achieved the uniformity desired while still allowing the use of state law. Comments expressed by delegates at the early stages of the negotiations leading up to the Convention may indeed be reflective of a desire to eliminate all reference to the laws of the various sovereign nations in an effort to achieve complete uniformity, but the Convention clearly departed from the desires of those delegates as evidenced by the provisions that call for the use of local law. Those courts who rely on such comments fail to give the proper import to the Convention's "however founded" language and to the express references to state law. Their concerns about uniformity are nonetheless satisfied by the existence of the Convention's exclusive remedy, which, among other things, allows claims not otherwise available under local law to be filed under the Convention and which limits the liability that can be imposed on carriers for claims brought under local law.[11]

For the reasons set forth above, this court holds that the Warsaw Convention does not create the exclusive cause of action in those cases to which it is applicable.

Preemption

Having determined that the Warsaw Convention does not create an exclusive cause of action, this court next addresses whether the defendants can properly remove this case. In

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11 As an exclusive remedy, the Warsaw Convention creates a cause of action which allows suit where a cause of action would not otherwise be available. This result satisfies the uniformity concern of those delegates who desired to assure that relief would be available, even in nations with laws on compensation that "dragged" behind the laws of other nations. Yet, the "however founded" language of Article 24 allows local causes of action "subject to the conditions and limits set out in this convention." Warsaw Convention Art. 24(1). The Convention therefore achieves uniformity by creating a remedy where none exists, as well as by limiting the remedy otherwise available under local laws.

making this determination, the court must look to the plaintiff's complaint. In her complaint, the plaintiff has set forth a claim solely under the Florida Wrongful Death Act, thereby choosing to forego any federal cause of action founded under the Warsaw Convention. As such, the only basis for removal to this court would be founded upon the "well-pleaded complaint" rule. As this court has stated in *Rhymes*, however, because the Warsaw Convention does not provide the exclusive cause of action in cases to which it applies, the plaintiff may, at her election, set forth her claim solely under a state law theory. If, as here, the plaintiff elects to sue solely upon an available state law cause of action, the defendants cannot remove merely by asserting a preemption defense that would limit and condition the state law cause of action. *See Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 1520-21, 103 L.Ed.2d 924 (1989); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63-66, 107 S.Ct. 1542, 1546-47, 95 L.Ed.2d 55 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Rhymes*, 636 F.Supp. at 742 ("Pleading a defense under the Warsaw Convention as the Defendants have done will not lay a proper basis for removal to this court.").

The plaintiff and the *amicus curiae* have also argued that removal is inappropriate and that a remand is mandated even if this court were to hold that the Warsaw Convention's cause of action is the exclusive cause of action available. Because a ruling on this issue is unnecessary and because it would be based on an interpretation of the Warsaw Convention that this court has declined to follow, this court chooses not to address this issue. The court further wishes to make clear that it expresses no view on the merits of this argument, and this opinion should not be interpreted as either approving or disapproving of the argument set forth by the plaintiff and the *amicus curiae*.

Because the plaintiff has set forth a cause of action under state law without bringing in any federal theory and because the Warsaw Convention's cause of action is not exclusive, the

plaintiff's complaint does not arise under federal law so as to confer removal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. While the Warsaw Convention's exclusive remedy may indeed serve to preempt inconsistent and contradictory provisions of the plaintiff's state law theory, this preemption arises only as a defense to the plaintiff's claims. Accordingly, after careful consideration of this matter, this court

ORDERS and ADJUDGES that the plaintiff's motion for remand be, and the same hereby is, GRANTED. This case is hereby REMANDED to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida.

DONE and ORDERED.